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No. 80-901

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

DOUGLAS DEWEY and WAUKESHA LIME AND STONE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED

Whether Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), violates the Fourth Amendment insofar as it authorizes federal mine inspectors to conduct warrantless safety and health inspections of stone quarries.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	3
Statement	5
Summary of argument	10
Argument:	
Warrantless safety and health inspections of stone quarries and other mines pursuant to the Mine Safety and Health Act of 1977 are reasonable under the Fourth Amendment	15
A. This Court has recognized an exception to the warrant requirement for regulatory inspections of "pervasively regulated industries"	16
B. Safety and health inspections performed by the Secretary of Labor under the Mine Safety Act meet the criteria established in *United States* v. *Biswell* for valid warrantless searches:	
1. The statutory inspection scheme serves important governmental interests	18
2. Warrantless searches are essential to effective implementation of the regulatory program	24
3. The Mine Safety Act provides adequate protections for the privacy interests of mine operators	30
C. *Marshall* v. *Barlow's, Inc.* does not control this case because the inspection scheme under the Mine Safety Act is substantially different from the Occupational Safety and Health Act inspection program at issue in *Barlow's*	34
Conclusion	43

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TABLE OF AUTHORITIES

Cases: Page

Almeida-Sanchez v. *United States*, 413 U.S. 266.... 35
Arkansas v. *Sanders*, 442 U.S. 753 .....11, 16, 39
Brown & Williamson Tobacco Corp. v. *Engman*, 527 F.2d 1115, cert. denied, 426 U.S. 911 41
Camara v. *Municipal Court*, 387 U.S. 523 ....11, 12, 27, 39
Cardwell v. *Lewis*, 417 U.S. 583 ..... 13, 31
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 .....9, 11, 17, 40
Coolidge v. *New Hampshire*, 403 U.S. 443 16
Delaware v. *Prouse*, 440 U.S. 648 .....11, 17, 30, 35
Go-Bart Importing Co. v. *United States*, 282 U.S. 344 16
Katz v. *United States*, 389 U.S. 347 16
Mancusi v. *DeForte*, 392 U.S. 364 31
Marshall v. *Barlow's Inc.*, 436 U.S. 307 .....*passim*
Marshall v. *Cedar Lake Sand and Gravel Co.*, 480 F. Supp. 171 36
Marshall v. *Donofrio*, 465 F. Supp. 838, aff'd, 605 F.2d 1196, cert. denied, 444 U.S. 1102 36
Marshall v. *Gibson's Products, Inc.*, 584 F.2d 668.. 26
Marshall v. *Nolichukey Sand Co., Inc.*, 606 F.2d 693, cert. denied, 446 U.S. 908 ..... 36, 37
Marshall v. *Sink*, 614 F.2d 37 ..... 36, 37
Marshall v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589, cert. denied, 444 U.S. 1015 .....32, 33, 37
Marshall v. *Texoline Co.*, 612 F.2d 935 .....32, 37, 38
Marshall v. *Wait*, 628 F.2d 1255 36
Payton v. *New York*, 445 U.S. 573 16
Schneckloth v. *Bustamonte*, 412 U.S. 218 16
See v. *City of Seattle*, 387 U.S. 541 ..... 29, 30
South Dakota v. *Opperman*, 428 U.S. 364 31
Torres v. *Puerto Rico*, 442 U.S. 465 17
United States v. *Biswell*, 406 U.S. 311 .....9, 11, 13, 16, 17, 19, 24, 29, 30, 33
United States v. *Martinez-Fuerte*, 428 U.S. 543.. 16
United States v. *Mississippi Power & Light Co.*, No. 79-2636 (5th Cir. Mar. 6, 1981) 40
United States ex rel. Terraciano v. *Montanye*, 493 F.2d 682, cert. denied, 419 U.S. 875 31

Cases (continued):	Page
United States v. *United States District Court*, 407 U.S. 297	16
Ybarra v. *Illinois*, 444 U.S. 85	16
Youghiogheny & Ohio Coal Co. v. *Morton*, 364 F. Supp. 45	26, 30
Constitution, statutes and regulations:	
United States Constitution, Fourth Amendment	2, 10, 11, 15, 16, 17, 31, 36, 43
Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*	12, 20, 36
30 U.S.C. 813(b)(1)	20
30 U.S.C. 818	20
Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 721 *et seq.*	19
30 U.S.C. 723	7
30 U.S.C. 724	7, 20
30 U.S.C. 733(a)	20
Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, 30 U.S.C. (Supp. II) 801 *et seq.*	12, 20, 22
Section 2, 30 U.S.C. (Supp. II) 801	22
Section 3(h)(1), 30 U.S.C. (Supp. II) 802 (h)(1)	20
Section 101, 30 U.S.C. (Supp. II) 811	20
Section 101(e), 30 U.S.C. (Supp. II) 811(e)	30, 39
Section 103, 30 U.S.C. (Supp. II) 813	20
Section 103(a), 30 U.S.C. (Supp. II) 813(a)	2, 7, 9, 10, 11, 20, 25, 26, 30
Section 103(f), 30 U.S.C. (Supp. II) 813(f)	38
Section 103(g), 30 U.S.C. (Supp. II) 813(g)	27
Section 103(i), 30 U.S.C. (Supp. II) 813(i)	25
Section 104, 30 U.S.C. (Supp. II) 814	20
Section 104(a), 30 U.S.C. (Supp. II) 814(a)	8
Section 105(d), 30 U.S.C. (Supp. II) 815(d)	8, 40
Section 106, 30 U.S.C. (Supp. II) 816	8, 40
Section 107, 30 U.S.C. (Supp. II) 817	21
Section 108, 30 U.S.C. (Supp. II) 818	9
Section 108(a), 30 U.S.C. (Supp. II) 818(a)	20

Constitution, statutes and regulations (continued): Page

Section 108(a)(1), 30 U.S.C. (Supp. II) 818(a)(1) 4, 8, 20, 33
Section 108(a)(1)(C), 30 U.S.C. (Supp. II) 818(a)(1)(C) 25
Section 108(a)(1)(D), 30 U.S.C. (Supp. II) 818(a)(1)(D) 25
Section 110(a), 30 U.S.C. (Supp. II) 820(a) .. 8, 40
Section 112, 30 U.S.C. (Supp. II) 822 28
Section 113, 30 U.S.C. (Supp. II) 823(d) 8
Section 113(d)(1), 30 U.S.C. (Supp. II) 823(d)(1) 8, 40
Section 113(d)(2)(A), 30 U.S.C. (Supp. II) 823(d)(2)(A) 40

Gun Control Act of 1968, 18 U.S.C. 923(g) 17
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*:

Section 3(5), 29 U.S.C. 652(5) 37
Section 5(a)(1), 29 U.S.C. 654(a)(1) 38
Section 6, 29 U.S.C. 655 38
Section 8(a), 29 U.S.C. 657(a) 34, 37
Section 8(a)(1), (2), 29 U.S.C. 657(a)(1), (2) 37
Section 8(a)(2), 29 U.S.C. 657(a)(2) 38

Organized Crime Control Act of 1970, 18 U.S.C. 843(f) 6, 32
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 37
42 U.S.C. 5846(d) 42
10 C.F.R. 19.14 42
30 C.F.R. 100.4 ..... 8, 40

Miscellaneous:

123 Cong. Rec. (1977):

p. 4388 25
p. 4397 23
p. 19927-19928 23
p. 19932 23
p. 19942 29

Miscellaneous (continued): Page

p. 19952 23
p. 20050 23
p. 22981 23
pp. 23159-23160 23
p. 23182 23
45 Fed. Reg. 25564 (1980) 32
45 Fed. Reg. 65918 (1980) 29
Mine Safety and Health Administration of the Department of Labor, *Informational Report IR 1112, Injury Experience in Coal Mining, 1978* (1979); *IR 1122, Injury Experience in Coal Mining, 1979* (1980); *IR 1113, Injury Experience in Stone Mining, 1979* (1980) 24
1 *Health and Safety Study of Metal and Nonmetal Mines, A Report to the Congress By The Secretary of the Interior in Response to Pub. L. No. 87-300, 75 Stat. 649* (1965) 42
H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970) 32
H.R. Rep. No. 95-312, 95th Cong., 1st Sess. (1977) 19, 21, 22, 23
S. Rep. 1296, 89th Cong., 2d Sess. (1966) 19
S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. (1977) 39
S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977) .. 11, 21, 22, 23, 26, 28-29

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The main opinion of the district court (J.S. App. 1a-6a), as amended sua sponte (J.S. App. 8a, 10a), is reported at 493 F. Supp. 963. The opinion of the district court denying a motion by the Secretary of Labor to alter or amend the judgment (J.S. App. 11a-12a) is not reported. The opinions of the district court at the preliminary injunction stage (J.S. App. 13a-16a; *id.* at 17a-19a) are also not reported.

JURISDICTION

The judgment of the district court was entered on July 15, 1980 (J.S. App. 7a), and was amended sua sponte on July 22, 1980 (J.S. App. 9a). The district court denied the Secretary of Labor's motion to alter or amend the judgment on August 11, 1980 (J.S. App. 11a-12a). The Secretary filed a notice of appeal to this Court on September 9, 1980 (J.S. App. 20a). On October 30, 1980, Justice Stevens extended the time for docketing the appeal to and including December 8, 1980. The jurisdictional statement was filed on December 4, 1980, and the Court noted probable jurisdiction on January 26, 1981 (J.A. 30a). This Court has jurisdiction under 28 U.S.C. 1252. *Williams* v. *Zbaraz*, No. 79-4 (June 30, 1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. a. Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 813(a), provides:

> Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year

for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary [of Labor] shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary [of Labor] shall develop guidelines for additional inspections of mines based on criteria including but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

b. Section 108(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) 818 (a)(1), provides:

> The Secretary [of Labor] may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—
>
> (A) violates or fails or refuses to comply with any order or decision issued under this chapter,
>
> (B) interferes with, hinders, or delays the Secretary [of Labor] or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter,
>
> (C) refuses to admit such representatives to the coal or other mine,
>
> (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occuring in, or connected with, such mine,
>
> (E) refuses to furnish any information or report requested by the Secretary [of Labor] or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or
>
> (F) refuses to permit access to, and copying of, such records as the Secretary [of Labor] or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter.

STATEMENT

1. Appellee Waukesha Lime and Stone Company operates a limestone quarry and mill facility in Waukesha, Wisconsin. Waukesha's operation is located on a 300-acre tract of land bisected by a state highway and two railroad lines (J.A. 26a). Waukesha employs about 30 full-time and two part-time workers (Dewey deposition at 21 (Aug. 8, 1979)).

Two quarries are located on Waukesha's property. The quarries consist of open pits that extend to a depth of 30 feet in certain places. The work at the quarries involves the use of explosives to dislodge pieces of rock from the quarry wall. The dislodged rock is loaded onto a truck by a mechanical loader and transported to a crushing facility where it is crushed and sorted according to size through a system of screens. The rock is then taken from the crusher to the "dust house" where it is dried, ground, and bagged (Dewey deposition at 6-10).

Customers may purchase and pick up limestone at Waukesha's facility, and on an average day approximately 100 trucks enter the company's property for this purpose (J.A. 26a-27a). "Pick-up" customers place their orders at the scale house located near Waukesha's main entrance and then proceed unescorted to the dust house to pick up their orders. Waukesha's customers are not specifically instructed that they may not enter the dust house (J.A. 26a).

In addition to Waukesha's customers, railroad employees regularly enter Waukesha's property to operate and maintain a spur line. Representatives from Waukesha's employees' unions also enter the premises, and Waukesha has consented to inspections of its operation by its workers' compensation insurance policy carrier. Furthermore, Waukesha's quarry and

mill have been inspected by representatives of the United States Department of the Treasury and the Wisconsin Department of Natural Resources (J.A. 27a; Dewey deposition at 18-22, 26).[1]

Since about 1922, quarries such as Waukesha's have been subject to safety and health inspections by representatives of the Wisconsin Department of Industry, Labor and Human Relations to ensure compliance with mandatory state mining standards (J.A. 27a; Delaney deposition at 3-5 (Aug. 7, 1979)).[2] State safety engineers generally conduct inspections of underground mines every two months and of surface mines once each year. Wisconsin mine inspectors do not obtain or produce search warrants before inspecting mines. State records indicate that the quarry now run by Waukesha was inspected and dust related violations in the dust house were cited in July

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[1] Pursuant to 18 U.S.C. 843(f), the Secretary of the Treasury is authorized to inspect explosive materials stored at mining facilities such as Waukesha's (see page 32, *infra*). The Wisconsin Natural Resources Department conducts inspections of water pumped by Waukesha and other industries into nearby rivers to ensure compliance with pollution control standards (Dewey deposition at 18).

[2] The most recent state inspection of Waukesha's operation that is noted in the record was conducted in April 1979 by Jack Delaney, a state mine safety specialist (J.A. 28a). This inspection took the entire day and covered all areas of Waukesha's operation; Delaney noted 26 violations of mandatory standards, six of which were in the dust house (J.A. 28a-29; Delaney deposition at 7, 8, 10). In the previous six years, Delaney inspected the Waukesha facility six or seven times and conducted a "re-inspection" almost every time (Delaney deposition at 5). Delaney never obtained or was asked to obtain a search warrant when inspecting Waukesha's facility and was not restricted in his access to any areas of the quarry and mill (J.A. 28a).

1953, July 1957, and February 1967 (J.A. 28a). Waukesha's present owner, Payne & Dolan, Inc., purchased the Waukesha quarry and mill facility in May 1967. Payne & Dolan was aware at the time of the purchase that the facility was subject to safety and health inspections (J.A. 26a).

2. Since 1966, Waukesha's quarry and mill operation has also been inspected regularly for health and safety violations by federal mine inspectors under Section 103(a) the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. (Supp. II) 813(a), or a predecessor statute, the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 723, 724. Following an inspection of Waukesha's facility in April 1978, Walter Brey, a federal mine inspector, issued 25 citations for violations of mandatory health and safety standards (J.S. App. 13a). An earlier inspection, conducted in September 1975 after the work-related death of one of Waukesha's employees, had resulted in the issuance of two notices of safety violations (*ibid.*).

On July 10, 1978, Brey attempted to conduct another inspection of Waukesha's quarry and mill pursuant to the Mine Safety Act. The purpose of this inspection was to determine whether Waukesha had corrected one of the violations of mandatory federal health standards discovered during Brey's inspection in April 1978. Specifically, Brey intended to ascertain whether Waukesha had sufficiently reduced the amount of silica-bearing dust to which an employee bagging stone in the dust house had been exposed (J.A. 11a, 25a).

After Brey had been at the Waukesha premises for an hour, he went to see Waukesha's president,

appellee Douglas Dewey. Dewey refused to allow Brey to continue his inspection unless he obtained a search warrant (J.A. 3a, 5a-6a, 7a, 12a, 25a-26a). Brey thereupon issued a citation to Waukesha, pursuant to Section 104(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 814(a), for denial of entry (J.S. App. 5a).[3]

3. On February 23, 1979, the Secretary filed this civil action against appellees Dewey and Waukesha in the United States District Court for the Eastern District of Wisconsin, pursuant to Section 108(a)(1) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818 (a)(1). The Secretary's complaint sought injunctive relief barring appellees from refusing to permit warrantless inspections of the Waukesha quarry and mill under the Mine Safety Act (J.A. 3a-4a). In

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[3] The Mine Safety Act provides that the Secretary shall issue citations and propose civil penalties for violations of the Act or of any mandatory health and safety standard promulgated under the Act. 30 U.S.C. (Supp. II) 814(a), 820(a). The Secretary's regulations provide for the assessment of a civil penalty for denial of entry. 30 C.F.R. 100.4. When an operator contests a citation, the Act provides for a hearing before an administrative law judge, whose decision is subject to discretionary review by the Federal Mine Safety and Health Review Commission. 30 U.S.C. (Supp. II) 815(d), 823(d). The operator is entitled to review of the final administrative decision as of right in the court of appeals. 30 U.S.C. (Supp. II) 816.

In this case, the Secretary's proposed civil penalty of $1,000 was upheld by an administrative law judge. Waukesha's petition for review of the administrative law judge's decision was granted, and its challenge to the validity of the proposed penalty is currently under submission to the Federal Mine Safety and Health Review Commission. *Waukesha Lime and Stone Co., Inc.* v. *Secretary of Labor*, FMSHRC Docket No. VINC 79-66-PM.

response to the complaint, Waukesha sought an injunction requiring the Secretary to obtain a search warrant prior to inspecting its facility (J.A. 7a-9a).

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of Waukesha, holding that Section 103(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 813(a), is unconstitutional insofar as it authorizes warrantless inspections of stone quarries (J.S. App. 1a-10a).[4] The district court acknowledged that this Court has permitted warrantless searches of commercial establishments in certain regulated industries (J.S. App. 1a, citing *United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms); and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) (liquor)), and that several courts of appeals have specifically upheld the constitutionality of warrantless inspections of stone quarries and sand pits pursuant to the Mine Safety Act (J.S. App. 2a-4a). Nevertheless, relying on language in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the district court concluded that warrantless administrative searches are not constitutionally permissible except in industries that have had a long tradition of governmental

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[4] In its initial opinion, the district court cited Section 108 of the Mine Safety Act, 30 U.S.C. (Supp. II) 818, which authorizes the Secretary to seek injunctions to enforce the Act, as the provision it found unconstitutional (J.S. App. 6a). The court thereafter amended its opinion and judgment to reflect the fact that its decision was limited to holding unconstitutional Section 103(a) of the Act, 30 U.S.C. (Supp. II) 813(a), the warrantless inspection provision (J.S. App. 8a-10a; see also *id.* at 11a-12a).

The district court had previously denied the Secretary's and Waukesha's motions for a preliminary injunction (J.S. App. 19a).

regulation (J.S. App. 2a). Because stone quarries were not subjected to extensive federal regulation until 1966, the court ruled that such quarries have not had a sufficiently lengthy regulatory history to justify warrantless inspections under the *Biswell-Colonnade* exception to the Fourth Amendment's warrant requirement (J.S. App. 5a-6a).

SUMMARY OF ARGUMENT

In enacting the Federal Mine Safety and Health Act of 1977, Congress established a comprehensive scheme to regulate health and safety conditions in all of the nation's mines. The Act requires the Secretary of Labor to develop detailed mandatory health and safety standards. In order to ensure compliance with those standards, the Secretary and his representatives are empowered to conduct frequent and regular inspections of all mines and to issue citations for violations of the standards.

Under Section 103(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 813(a), each underground mine must be inspected no fewer than four times per year and each surface mine must be inspected at least twice per year. In addition, the Secretary is required to conduct follow-up inspections to ensure that previously-cited violations of mandatory health and safety standards have been abated. The language and legislative history of the Act make clear that Congress intended these inspections to be undertaken without a warrant. Section 103(a) grants the Secretary "a right of entry to, upon, or through any coal or other mine" and expressly states that "no advance notice of an inspection shall be provided to any person * * *." The Secretary thus has "a broad right-of-entry * * * to make inspections and investigations of all mines under this Act without first ob-

taining a warrant." S. Rep. No. 95-181, 95th Cong., 1st Sess. 27 (1977).

These warrantless safety and health inspections under the Act are, we submit, reasonable under the Fourth Amendment. The district court held, however, that Section 103(a) of the Act is unconstitutional insofar as it authorizes warrantless searches of stone quarries, because such facilities have not had a long history of governmental regulation. We believe that the decision below rests upon a fundamental misconception of the administrative search exception to the warrant requirement.

The guiding standard of the Fourth Amendment is reasonableness. See *Delaware* v. *Prouse*, 440 U.S. 648, 653-655 (1979); *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539 (1967). Although the Court has stated that warrantless searches are per se unreasonable under the Fourth Amendment, it has recognized certain limited exceptions to the warrant requirement where the public interest has required a more flexible approach. See *Arkansas* v. *Sanders*, 442 U.S. 753, 759 (1979). One such exception concerns inspections of "pervasively regulated industries." This exception was applied to the alcoholic beverage industry in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and was later applied to the firearms industry in *United States* v. *Biswell*, 406 U.S. 311 (1972). In *Biswell*, the Court acknowledged that the firearms industry did not have the same lengthy history of government regulation as did the liquor industry. Nonetheless, the Court applied the exception because of the substantial federal interest in regulating firearms traffic, the importance of inspections to the regulatory scheme, the likelihood that a warrant requirement would frustrate inspec-

tions, and the limited threat posed by inspections to firearms dealers' reasonable privacy expectations.

These factors are all present in this case involving federal inspection of an extremely dangerous and critical industry. First, the federal interest in mine safety and health is considerable. Congress was aware that the mining industry is among the most hazardous in the nation. In the findings and purpose section of the Mine Safety Act, 30 U.S.C. (Supp. II) 801, Congress explained that unsafe and unhealthful conditions in the nation's mines are impediments to the future growth of the mining industry and that both the disruption of production and the loss of income resulting from accidents and diseases unduly burden commerce. Congress also recognized that there is an urgent federal interest in improving working conditions and practices in the mining industry to ensure the adequate production of minerals while at the same time reducing the enormous cost to society caused by mining accidents and debilitating occupational diseases.

Second, the legislative history of the Mine Safety Act is replete with evidence showing that frequent and unannounced inspections are essential to the success of any program designed to provide safer and more healthful working conditions in the mines. The history of the mining industry establishes that regular inspections and the threat of penalties for violations of safety and health standards are absolutely necessary to obtain compliance with the standards. Moreover, given the existence of "reasonable legislative * * * standards for conducting an inspection" (*Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538) and a statutory mandate of frequent and recurring inspections, the imposition of a warrant requirement

each time an inspection must be performed would compel both the Secretary and the courts to engage in an essentially meaningless exercise. Resort to consensual inspections is an unsatisfactory alternative because it would allow the operator to withhold consent to search and then to take temporary cosmetic safety steps, thus giving the operator advance notice of the inspection and thwarting the purpose of the inspection program.

Third, the inspections pose only a minimal threat to a mine operator's reasonable expectations of privacy. A mine "seldom serves as one's" residence or as the repository of personal effects." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). Moreover, Waukesha's mine, like virtually all other mines, is subject to pervasive regulation and inspection by the federal and state governments. Thus, mine operators engaged in this closely regulated and hazardous industry can be presumed to be cognizant of and to have consented to the slight privacy intrusion necessitated by regular health and safety inspections. The Mine Safety Act protects any unusual privacy interests of the mine operator by providing an opportunity to be heard in court if entry is refused and an injunction is sought by the Secretary. In addition, the operator may contest in administrative proceedings and in court any citations issued for violations of mandatory health and safety standards.

Thus, the Mine Safety Act meets the criteria set out by this Court in *Biswell*, because the "regulatory inspections further urgent federal interest and the possibilities of abuse and the threat to privacy are not of impressive dimensions" (406 U.S. at 317). The district court nonetheless concluded that warrantless inspections pursuant to the Act could not

survive scrutiny under this Court's decision in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), because stone quarries such as Waukesha's have not had a long tradition of governmental regulation. In *Barlow's*, the Court refused to extend the "pervasively regulated industry" exception to the numerous and diverse industries subject to the Occupational Safety and Health Act of 1970. But nothing in that decision casts doubt on the continuing validity of the administrative search exception or suggests an intent to abandon the holding in *Biswell* that the duration of government regulation is not necessarily dispositive in determining the reasonableness of warrantless inspections of pervasively regulated businesses.

Furthermore, as every court of appeals to consider the question has held, there are significant differences between the statutory scheme in *Barlow's* and the statutory scheme involved in the instant case. The Mine Safety Act, unlike OSHA, applies to a single industry with an acknowledged history of serious accidents and unhealthful working conditions; the inspection provisions of the Mine Safety Act are more narrowly drawn than those of OSHA; and there is less likelihood of the abuse of "unbridled discretion of executive and administrative officers" (436 U.S. at 323) that the Court in *Barlow's* found objectionable. The district court's reliance on *Barlow's* is therefore misplaced.

Finally, it is ironic that the result engendered by the district court's decision—a two tiered program of regulation—is precisely the one rejected by Congress when it enacted the Mine Safety Act. Under the ruling below, coal mines, with their recognized lengthy history of federal regulation, may be inspected without warrants, while the equally hazard-

ous and important noncoal mining industry may be subject to inspection only after search warrants are first obtained. By combining regulation of all mines under a single statute in 1977, Congress intended to avoid such unequal protection of the nation's miners.

ARGUMENT

WARRANTLESS SAFETY AND HEALTH INSPECTIONS OF STONE QUARRIES AND OTHER MINES PURSUANT TO THE MINE SAFETY AND HEALTH ACT OF 1977 ARE REASONABLE UNDER THE FOURTH AMENDMENT

The district court in this case has held unconstitutional an important federal statute that was specifically designed to protect the health and safety of workers in an industry that Congress found to be among the most hazardous in the nation. As we demonstrate, the district court's decision is inconsistent with the established exception to the Fourth Amendment's warrant requirement for inspections of pervasively regulated businesses. The mining industry has a long history of government oversight and is subject to detailed federal regulation; the privacy interests at stake here are minimal and are adequately protected by the statute and implementing regulations; and a warrant requirement would impose a serious burden on the inspection system and would jeopardize enforcement of the health and safety protection scheme enacted by Congress. Moreover, the decision below is not supported by *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), upon which the district court heavily relied.

A. This Court Has Recognized An Exception To The Warrant Requirement For Regulatory Inspections Of "Pervasively Regulated Industries"

The Fourth Amendment imposes two separate, although related, limitations on searches and seizures. The first clause of the Amendment protects "the basic right to be free from unreasonable searches and seizures," and the second clause requires "that warrants be particular and supported by probable cause." *Payton* v. *New York*, 445 U.S. 573, 584 (1980). See *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931). Although the Amendment itself does not suggest the interrelation between the two clauses (see *Ybarra* v. *Illinois*, 444 U.S. 85, 100-101 (1979) (Rehnquist, J., dissenting)), the Court has stated on a number of occasions that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967). See also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); *United States* v. *United States District Court*, 407 U.S. 297, 314-321 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971).

These exceptions "have been established where it was concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976). Accordingly, the Court has recognized an exception to the warrant requirement in cases of government inspections of "pervasively regulated business[es]." *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).

See *Torres* v. *Puerto Rico*, 442 U.S. 465, 473 (1979); *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979). In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), for example, the Court considered the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. After reviewing the history of federal regulation in the area of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and "has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U.S. at 76. Hence, the Court unanimously ruled that the Fourth Amendment did not bar warrantless inspections to enforce the liquor laws. However, the Court held that the particular inspection at issue was beyond the scope of the statute because Congress had not expressly authorized forcible entries without a warrant, but instead had made it an offense for a licensee to refuse admission to an inspector. *Id.* at 77.

Thereafter, in *United States* v. *Biswell*, *supra*, the Court upheld the warrantless search provisions of the Gun Control Act of 1968, 18 U.S.C. 923(g), despite the fact that, as the decision explicitly recognized, "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry * * *." 406 U.S. at 315. The Court found that warrantless inspections pursuant to this statute were reasonable under the Fourth Amendment both because they were essential to effective enforcement of the law and because such inspections posed only a limited interference with the legitimate privacy expectations of firearms dealers. The Court first noted that regulation of firearms traffic was of "central importance to federal efforts to prevent violent crime" and that "inspection

is a crucial part of the regulatory scheme * * *." 406 U.S. at 315. In addition, the Court pointed out that if inspections were to serve as a credible deterrent, they must be frequent and unannounced: "In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *Id.* at 316. Finally, the Court observed that firearms dealers elect to engage in this pervasively regulated business with the knowledge that their enterprise will be subject to inspection, and that dealers are regularly furnished with information concerning the purposes of the inspector and the limits of his investigative authority. *Ibid.* In light of these considerations, the Court concluded that "where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *Id.* at 317.

As we now show, warrantless safety and health inspections of stone quarries and other mines pursuant to the Mine Safety Act satisfy the standards established in *Biswell* and are therefore reasonable under the Fourth Amendment.

B. Safety And Health Inspections Performed By The Secretary Of Labor Under The Mine Safety Act Meet The Criteria Established In *United States* v. *Biswell* For Valid Warrantless Searches

1. *The Statutory Inspection Scheme Serves Important Governmental Interests*

Because of the dangerous working conditions in the nation's mines, the failure of mine operators to correct hazardous conditions, and the substantial damage to society and to interstate commerce resulting

from mine-related accidents, the federal government has a valid and overriding interest in the health and safety of the nation's miners. "Large interests are at stake, and inspection is a crucial part of the regulatory scheme" (*United States* v. *Biswell*, *supra*, 406 U.S. at 315), because it helps to insure that miners are not exposed to unduly hazardous and unhealthful conditions.

In subjecting the coal mining industry to pervasive regulation, Congress long ago recognized the particular dangers involved in mining. See H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 2 (1977). The health and safety of miners in other extractive industries first came under federal regulation in 1966, with the passage of the Federal Metal and Nonmetallic Mine Safety Act (Metal Act), 30 U.S.C. 721 *et seq.* In its report on the Metal Act, the Senate Committee on Labor and Public Welfare cited a study by the Mine Safety Study Board concerning conditions in the metal and nonmetallic mining industry. The study found that, of 270 workers killed in mining accidents in an 18-month span, approximately half were classified as victims of inadequate supervision or hazardous conditions that were within the power of mine operators to correct, including failure to provide safety devices, defective equipment, roof collapses, and inadequate ventilation. S. Rep. No. 1296, 89th Cong., 2d Sess. 2-3 (1966). In rejecting several amendments to exclude sand, gravel, and crushed stone operations from coverage under the Metal Act, the Committee observed that the available statistics concerning injury frequency and severity "conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries." *Id.* at 7.

The Mine Safety Act was enacted in 1977, when Congress combined regulation of all mines under one statute and placed inspection control in the hands of the Secretary of Labor. Pub. L. No. 95-164, 91 Stat. 1290 *et seq.* This enactment repealed the Metal Act and amended the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), 30 U.S.C. 801 *et seq.*, to include mines previously covered under the Metal Act.[5]

The extent of federal regulation under the Mine Safety Act is far-reaching and pervasive. The Secretary of Labor is directed to develop detailed mandatory safety and health standards for all mines for the protection of life and prevention of injuries. 30 U.S.C. (Supp. II) 811. Representatives of the Secretary are empowered and required to inspect all mines frequently in order to obtain and disseminate safety and health information, investigate accidents, and monitor compliance with safety and health standards (30 U.S.C. (Supp. II) 813); to issue and enforce citations for failure to follow safety and health standards (30 U.S.C. (Supp. II) 814); and to order that all miners be withdrawn immediately from affected

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[5] The Mine Safety Act defines "coal or other mine" to include "an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground." 30 U.S.C. (Supp. II) 802(h)(1). The definition also includes property used in the milling of minerals or in the preparation of coal or other minerals. Both the Metal Act and the Coal Act contained right of entry inspection provisions virtually identical to Section 103(a) of the Mine Safety Act. See 30 U.S.C. 724; 30 U.S.C. 813(b)(1). Both Acts also had injunctive procedures quite similar to Section 108(a) of the Mine Safety Act, 30 U.S.C. (Supp. II) 818(a). See 30 U.S.C. 733(a); 30 U.S.C. 818.

areas when imminently dangerous conditions are found to exist. 30 U.S.C. (Supp. II) 817.

Congress enacted the Mine Safety Act because of its concern that previous legislation had not provided sufficient protection to miners. In its report recommending passage of the Act, the Senate Committee listed several mining accidents in recent years that had taken the lives of 260 people, and noted that:

> [D]espite * * * considerable Congressional attention, our nation still experiences deaths and serious injuries in our mines at a rate which casts shame on an advanced, industrialized society. Every working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries in our nation's mines.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 4 (1977). Similarly, the House Report on the Act observed that, according to the National Safety Council, the death rate for mining in 1975 was four times as great as the average for all industries; the Council ranked mining as "the most hazardous of the eight major industry groupings." H.R. Rep. No. 95-312, *supra*, at 3. The House Report further noted that since 1958, a total of 7,640 miners had been killed on the job, 4,471 in coal mines and 3,269 in metal and nonmetal mines. *Id.* at 2.[6]

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[6] The Committee reports described various disasters that had occurred in both coal and noncoal mines in recent years and that had resulted in large numbers of fatalities. H.R. Rep. No. 95-312, *supra*, at 4-6; S. Rep. No. 95-181, *supra* at 4. Furthermore, the House Report reviewed in considerable detail the numerous occupational diseases and health hazards specifically associated with noncoal mining. H.R. Rep. No. 95-312, *supra*, at 10-13.

In recognition of the dangerous and unhealthful conditions in the nation's mines, Congress noted in the Act's statement of purpose that there was an urgent need to improve mine working conditions and to alleviate the disruptive effects of accidents on miners, their families, and the nation's commerce. 30 U.S.C. (Supp. II) 801. The Senate Report stressed the importance of improving mine safety in order to "encourage young people to go into the occupation of mining as the need of our nation for the minerals and energy sources extracted from the earth continues to increase." S. Rep. No. 95-181, *supra*, at 8.

Congress targeted mining for strict regulation because it concluded that mining operations are "so unique, so complex, and so hazardous as to not fit neatly under the Occupational Safety and Health Act. A miner's chances of getting killed on the job are more than eight times as great as those of a laborer in manufacturing * * *." H.R. Rep. No. 95-312, *supra*, at 1.[7] The debates on the Mine Safety Act reflect a firm desire on the part of Congress to keep the Act's regulatory program completely separate from the more general regulatory scheme ad-

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[7] The Senate Committee reported that:

> [F]atalities and disabling injuries in our nation's mines are still unacceptably and unconscionably high. According to the 1974 Annual Report on Occupational Safety and Health, the incidence of work related injuries and illnesses for miners exceeded the "all-industry" rate by about 14 percent. * * * According to the Report, "about one out of every 1500 mine workers * * * was killed on the job or died from work related injuries or illnesses in 1973, compared with one out of every * * * 12,400 for all workers covered by OSHA."

S. Rep. No. 95-181, *supra*, at 7.

ministered under OSHA. Several members of Congress emphasized that although responsibility for mine safety and health was to be transferred from the Department of the Interior to the Department of Labor, the mine program was to be administered by an entirely different unit than the OSHA program. See 123 Cong. Rec. 19952 (1977) (remarks of Sen. Williams); *id.* at 20050 (remarks of Sen. Williams); *id.* at 22981 (remarks of Rep. Oberstar); *id.* at 23182 (remarks of Rep. Gaydos).

Finally, one of the principal congressional concerns in enacting the Mine Safety Act was to ensure equal treatment of all classes of miners by combining regulation of coal and noncoal mines into one comprehensive statute.[8] See H.R. Rep. No. 95-312, *supra*, at 3-9. The Senate Report concluded: "[I]t is essential that there be a common regulatory program for all operators and equal protection under the law for all miners." S. Rep. No. 95-181, *supra*, at 13. One reason for this view was that stricter regulation under the prior Coal Act had proved more effective in reducing fatalities and serious injuries than had the less stringent protections provided by the Metal Act. See 123 Cong. Rec. 4397 (1977) (remarks of Sen. Church) *id.* at 19927-19928 (remarks of Sen. Javits); *id.* at 19932 (remarks of Sen. Randolph). Another reason was that a single oversight program could be more efficiently administered. See *id.* at 23159-23160 (remarks of Rep. Le Fante).

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[8] The district court's ruling frustrates this goal. Under the court's holding, coal mines, which have had an acknowledged long history of regulation, may be inspected without a warrant whereas noncoal mines may be inspected only pursuant to a warrant.

Clearly, the federal government has a substantial interest in safety and health conditions in both coal and noncoal mines.[9] The comprehensive nature of the Mine Safety Act's regulatory scheme evidences Congress' recognition of this fact. Congress properly concluded that a pervasive and uniform regulatory program is essential to protect that important federal interest.

2. *Warrantless Searches are Essential to Effective Implementation of the Regulatory Program*

Here, as in *Biswell*, warrantless inspections are essential "if the law is to be properly enforced and inspection made effective * * *." *United States* v. *Biswell, supra*, 406 U.S. at 316. Congress determined that frequent, unannounced, on-site inspections are

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[9] Recent statistics underscore the fact that noncoal mining operations such as Waukesha's stone quarry and mill are extremely hazardous. For example, in 1979 (the latest year for which complete data are available), the fatality rate at surface stone mines such as Waukesha's was three and one-half times that at surface coal mines, and the disabling injury rate was one and one-half times as high. The total injury rate was one and one-third times that at surface coal mines. Similar differences in fatality and injury rates existed in 1978. Stone processing plants are nearly as dangerous as stone mines and had accident frequency rates only slightly lower than those at coal processing plants for these two years. These comparisons were derived from the following official government publications prepared by the Mine Safety and Health Administration of the Department of Labor, *Informational Report IR 1112, Injury Experience in Coal Mining, 1978*, Table 2, at 13 (1979); *IR 1122, Injury Experience in Coal Mining, 1979*, Table 2, at 13 (1980); *IR 1113, Injury Experience in Stone Mining, 1978*, Table 2, at 11 (1979); *IR 1123, Injury Experience in Stone Mining, 1979*, Table 2, at 11 (1980).

necessary in order to enforce compliance with the safety and health standards to be developed by the Secretary of Labor.[10] Under Section 103(a) of the Mine Safety Act, each underground mine in the nation is to be inspected in its entirety at least four times annually, and all surface mines, including stone quarries such as Waukesha's, must be inspected at least twice annually. Section 103(a) of the Act also requires the Secretary to perform follow-up inspections to determine whether the mine operator has complied with citations directing the abatement of previously discovered violations of mandatory health and safety standards. 30 U.S.C. (Supp. II) U.S.C. 813(a).[11] In Section 108(a)(1)(C) and (D) of the Act, 30 U.S.C. (Supp. II) 818(a)(1)(C) and (D), Congress included specific provisions authorizing the Secretary to institute an action for injunctive relief to compel an operator to permit the Secretary's representative to enter the mine for the purpose of conducting an inspection. Inclusion of these provisions in the Act reflects Congress' determination that inspections

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[10] As Senator Williams, the primary sponsor of the Act, remarked: "If we are to have standards applicable to these mines, we must with regularity and frequency inspect all mines to make sure that these standards are being met." 123 Cong. Rec. 4[illegible]38 (1977).

[11] In addition, for mines that liberate excessive amounts of explosive gases, the Secretary is required to inspect once every five, ten, or fifteen days at irregular intervals. 30 U.S.C. (Supp. II) 813(i). In fiscal year 1979, the latest complete year for which statistics are available, there were 20,061 mines subject to the Mine Safety Act. Of those, 206 are considered gassy and, therefore, are subject to particularly frequent inspections. In fiscal year 1979, there were 1,978 federal inspection personnel, who performed 114,032 inspections and investigations.

are a crucial part of the regulatory scheme. Cf. *Marshall* v. *Gibson's Products, Inc.*, 584 F.2d 668, 674-675 (5th Cir. 1978).

Congress left no doubt that these inspections are to be accomplished without the use of a warrant. Section 103(a) of the Act absolutely prohibits the giving of advance notice of inspections to determine whether an imminent danger exists or whether the facility is in compliance with the mandatory health and safety standards of the Act.[12] Moreover, Section 103(a) provides that the Secretary's representative "shall have a right of entry to, upon, or through any coal or other mine" for the purpose of conducting an inspection under the Act. The Senate Report explicitly stated Congress' intention "to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act *without first obtaining a warrant.*" S. Rep. No. 95-181, *supra*, at 27 (emphasis added).[13]

Congress has thus instituted an extensive warrantless inspection program to protect against mine hazards and disasters. As Congress correctly recognized, a warrant requirement would seriously under-

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[12] On the other hand, the advance notice prohibition does not apply to inspections for the purposes of obtaining and disseminating information relating to health and safety conditions or of gathering information with respect to mandatory health or safety standards.

[13] The Senate Report noted with approval the decision in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (three-judge court), which upheld the constitutionality of warrantless inspections under the Coal Act (30 U.S.C. 813(a), (b)). S. Rep. No. 95-181, *supra*, at 27.

mine the ability of the Secretary to carry out his responsibilities under the Mine Safety Act.

To begin with, the imposition of a warrant requirement would serve little purpose beyond requiring the Secretary and the federal courts to engage in a meaningless exercise each time an inspection must be conducted. The Mine Safety Act itself contains a mandatory inspection scheme that meets the requirements of probable cause for an administrative search. It is settled that, in the administrative search context,

> probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."

Marshall v. *Barlow's, Inc., supra,* 436 U.S. at 320, quoting *Camara* v. *Municipal Court,* 387 U.S. 523, 538 (1967) (footnote omitted). Because Congress in the Mine Safety Act has established reasonable standards containing specific neutral criteria for conducting safety and health inspections of mines, the imposition of a warrant requirement would offer little more protection for mine operators than the Act already provides. As noted earlier (page 25 and note 11), under the Act the Secretary is required to inspect all surface mines twice annually, all underground mines four times annually, and all "gassy" mines at irregular five, ten, or fifteen-day intervals. In addition, he must perform follow-up inspections to determine if violations have been abated.[14]

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[14] Under Section 103(g) of the Act, 30 U.S.C. (Supp. II) 813(g), the Secretary is also required to conduct an immediate inspection of a mine after receiving notification from a

In these circumstances, the process of obtaining a warrant would be reduced to a series of mechanical gestures. Inspections would take place in the same fashion, except for the delay caused by drafting the necessary boilerplate affidavits and presenting them to a magistrate. As a result, the Secretary, the United States Attorneys (see 30 U.S.C. (Supp. II) 822) and the federal courts would be overburdened, and the purpose of the Mine Safety Act—the protection of miners—would be frustrated by the huge volume of paperwork generated in order to obtain warrants authorizing the more than 100,000 mine inspections performed annually (see note 11, *supra*).

On the other hand, if the Secretary initially seeks to inspect with the consent of the mine operator, the operator could simply refuse entry until a warrant is obtained in order to take cosmetic safety steps before the inspector returns, and could then revert to unsafe practices after the inspector departs. Congress was well aware of this possibility and therefore mandated that all mines be subject to unannounced inspections. The Senate Report explained:

> [I]n view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.
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> The Committee has specifically adopted the prohibition on advance notice of inspections which

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miner or a miner's representative that a violation of the Act or of a mandatory health or safety standard exists, or that an imminent danger exists. The operator is to be notified "forthwith" if the complaint reports the existence of an imminently dangerous condition.

> is currently the rule under the Coal Act, and rejects the provision of the Metal Act which permits such advance notice.

S. Rep. No. 95-181, *supra*, at 27. The problems associated with the giving of advance notice are illustrated by the results of an investigation following the Scotia mine disaster, which took the lives of 23 miners and three federal inspectors in March 1976. The investigation revealed that explosions in the mine were caused in part by the movement of brattices contrary to the safety code after inspectors had left, resulting in inadequate ventilation. See 123 Cong. Rec. 19942 (1977) (remarks of Sen. Williams).[15]

It is thus apparent that either alternative to warrantless inspections—*i.e.*, the use of a warrant in every case, or the obtaining of a warrant when an operator refuses to admit an inspector who arrives at an inopportune time—would seriously impede the Act's enforcement program. Here, as in *Biswell*, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections

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[15] The Department of Labor has found that advance notice has caused serious problems for OSHA inspections. It allows employers to shut down equipment before an inspection, and this is "particularly destructive to industrial hygiene inspections because dust and fumes can be manipulated by temporary reductions in production." 45 Fed. Reg. 65918 (1980). Advance notice also permits "temporary clean-ups, temporary repairs, modification of operations and sanitation of work areas by interim measures that temporarily disguise the true extent of an existing hazard." *Ibid.* Compare, *e.g.*, *See* v. *City of Seattle*, 387 U.S. 541 (1967), where "the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or correct in a short time." *United States* v. *Biswell, supra*, 406 U.S. at 316.

are essential. In this context, the prerequisite of a warrant could easily frustrate inspection" (406 U.S. at 316).

3. *The Mine Safety Act Provides Adequate Protections for the Privacy Interests of Mine Operators*

Warrantless inspections under the Mine Safety Act pose only a minimal threat to any reasonable expectations of privacy that mine operators may have. The Act has built-in protections to insure that the power of warrantless entry will not be abused, and the occurrence and frequency of inspections are not left entirely to the unfettered discretion of inspectors in the field. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323; cf. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 661.

As we have already explained (pages 24-30, *supra*,) Congress has mandated that regular inspections be conducted as a critical part of the safety and health standards enforcement mechanism and has specified the minimum number of annual inspections. 30 U.S.C. (Supp. II) 813(a). In addition, operators of mines must be familiar with the safety and health standards of the Mine Safety Act (see 30 U.S.C. (Supp. II) 811(e)) and thus are presumed to have full knowledge of the inspector's task and his authority to inspect. These factors were relied on by this Court in *Biswell* in upholding a warrantless search (406 U.S. at 316), and they also led the three-judge court in *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 51 (S.D. Ohio 1973), to hold that warrantless inspections under the Coal Act were reasonable. The inspections conducted under the Mine Safety Act are thus materially different from those disallowed in *Camara* v. *Municipal Court*, *supra*, and *See* v. *City of Seattle*, 387 U.S. 541 (1967). In those

cases, the Court found that the occupant of a home or owner of a commercial building had no way of knowing whether enforcement of a municipal code required inspection of his premises, whether inspectors were authorized to search, or whether the search exceeded the limits of the inspection powers. See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323-324.

Furthermore, as a general matter, any expectations of privacy enjoyed by operators of quarry and mill facilities such as Waukesha's are not likely to be substantial. A mine "seldom serves as one's residence or as the repository of personal effects." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). See also *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Compare *Mancusi* v. *DeForte*, 392 U.S. 364, 367-370 (1968). Indeed, as indicated above (pages 5-6, *supra*), Waukesha allows inspections of its operation by a variety of outsiders, including labor union and insurance carrier representatives, and it does not restrict public access to many of the places the Secretary sought to inspect (J.A. 26a-27a). More important, Waukesha is regularly inspected by mine safety engineers from the Wisconsin Department of Industry, Labor and Human Relations who do not obtain warrants and who are not restricted in their access to any area of the operation (J.A. 28a).[16] The state inspectors monitor compliance with Wisconsin mine safety codes and issue citations for violations. In fact, in the most recent state inspection noted in

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[16] See *United States ex rel. Terraciano* v. *Montanye*, 493 F.2d 682 (2d Cir.), cert. denied, 419 U.S. 875 (1974), where the court found that a warrantless search of pharmaceutical records pursuant to pervasive state regulation did not violate the Fourth Amendment.

the record, Waukesha was cited for six violations in the dust house, the same area federal inspector Brey was checking when he was asked to leave (J.A. 28a-29a).

In addition, certain areas of mines such as Waukesha's are subject to warrantless inspections under a wholly separate federal statute. As a "permittee" engaged in the lawful use of explosives, Waukesha's storage facilities for explosives may be inspected without a warrant by representatives of the Secretary of the Treasury under the Organized Crime Control Act of 1970, 18 U.S.C. 843(f).[17] Pursuant to an agreement between the Department of the Treasury and the Department of Labor, inspections for explosives at mining facilities under this statute are now conducted by representatives from the Mine Safety and Health Administration. See 45 Fed. Reg. 25564 (1980).[18]

If a mine operator does have special privacy interests it believes should be protected, the Mine Safety Act already provides an effective means for protecting them. The Act prohibits forcible entries and thus affords an operator an opportunity to obtain immediate judicial review of any special privacy claims it wishes to assert. See *Marshall* v. *Texoline Co.*, 612 F.2d 935, 937-938 (5th Cir. 1980); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 594 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980).

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[17] The warrantless search provisions of this statute were patterned after the statute that authorized the warrantless inspection in *Biswell*. See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 67 (1970).

[18] The record reflects that Waukesha's facility has been inspected by agents of the Department of the Treasury (J.A. 27a).

When an operator refuses to allow an inspection, the Secretary is authorized by 30 U.S.C. (Supp. II) 818 (a)(1) to file a civil action in federal district court to enjoin future denials of entry, as was done in the instant case. The district court in issuing the injunction may take steps to accommodate any unusual privacy expectations asserted by the mine operator. In *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594, for example, the district court imposed on the federal inspectors a confidentiality requirement in order to protect the mine operator's trade secrets.

In contrast to the injunction procedure under the Act, imposition of a warrant requirement would not provide any significant protection to those mine operators who might wish to assert unusual privacy claims. This is so both because a warrant may be obtained ex parte, without any opportunity for the mine operator to interpose particular objections prior to the search, and also because administrative search warrants need not be based on a specific showing of a violation but may issue on the ground that reasonable legislative or administrative standards have been satisfied (see page 27, *supra*).

In short, in this situation as in *Biswell*, "if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible." 406 U.S. at 316. Hence, adding a warrant requirement would gain the operators little, but would seriously impede enforcement of the Mine Safety Act.

C. *Marshall* v. *Barlow's, Inc.* Does Not Control This Case Because The Inspection Scheme Under The Mine Safety Act Is Substantially Different From the Occupational Safety and Health Act Inspection Program At Issue In *Barlow's*

Although the district court recognized that warrantless searches of business premises are constitutionally permissible in certain circumstances, it concluded, in reliance on language in *Marshall* v. *Barlow's, Inc.*, *supra*, that the administrative search exception to the warrant requirement is applicable only in those industries with a long tradition of governmental regulation. This conclusion is based on a misreading of this Court's decision in *Barlow's*. In fact, *Barlow's* reaffirmed the holding of *Biswell* that a warrant is not required for inspections of "pervasively regulated businesses." Subsequent to *Barlow's*, the courts of appeals have consistently held this exception applicable to noncoal mining operations such as Waukesha's.

Barlow's involved the constitutionality of warrantless searches under Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a). While it is true, as the district court noted (J.S. App. 2a), that the Court in *Barlow's* referred to a "long tradition of close government supervision" (436 U.S. at 313) as one factor distinguishing between enterprises that may be inspected without a warrant and those that may not, this statement was not intended to be exhaustive. Rather, the Court also expressly reaffirmed the exception to the warrant requirement for statutorily authorized warrantless searches of "pervasively regulated businesses" typified by *Biswell* (firearms), and explained that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their

trade * * *. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. at 313, quoting from *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 271 (1973).[19] In view of the fact that *Biswell* upheld warrantless searches in an industry that had not had a lengthy history of governmental regulation and that the decision in *Biswell* was cited approvingly in *Barlow's,* it is clear that the district court erred in concluding that warrantless inspections of stone quarries under the Mine Safety Act could not be sustained merely because quarries have not had a long tradition of federal regulation.

Moreover, although *Barlow's* refused to extend the exception for pervasively regulated businesses to all industries covered by the Occupational Safety and Health Act, the Court emphasized that its decision was limited to OSHA searches and that the reasonableness of warrantless inspections under other regulatory statutes would "depend upon the specific enforcement needs and privacy guarantees of each statute" (436 U.S. at 321). In particular, the Court recognized that "[s]ome * * * statutes * * * apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply" (436 U.S. at 321). The Court specifically cited the predecessor statutes of the Mine Safety Act as examples of regulatory schemes that were sufficiently distinguishable from OSHA that their constitutional valid-

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[19] As the Court similarly observed in *Delaware* v. *Prouse, supra,* 440 U.S. at 662, "[t]here are certain relatively 'unique circumstances' * * * in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise."

ity would not be placed in question by the holding in *Barlow's* (436 U.S. at 321-322 n.18).

Three courts of appeals have examined the enforcement needs and privacy protections of the Mine Safety Act in light of *Barlow's* and have concluded, contrary to the district court in this case, that warrantless searches of stone quarries or similar facilities are not unreasonable under the Fourth Amendment. See *Marshall* v. *Texoline Co., supra; Marshall* v. *Nolichukey Sand Co., Inc.*, 606 F.2d 693 (6th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *Marshall* v. *Stoudt's Ferry Preparation Co., supra.* See also *Marshall* v. *Cedar Lake Sand and Gravel Co.*, 480 F. Supp. 171 (E.D. Wis. 1979); *Marshall* v. *Donofrio*, 465 F. Supp. 838 (E.D. Pa. 1978), aff'd, 605 F.2d 1196 (3d Cir. 1979) (table), cert. denied, 444 U.S. 1102 (1980). In addition, the Fourth Circuit has permitted warrantless searches of an owner-operated coal mine. *Marshall* v. *Sink*, 614 F.2d 37 (1980).[20]

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[20] Prior to *Barlow's*, in *Youghiogheny & Ohio Coal Co.* v. *Morton, supra*, a three-judge court upheld warrantless searches of coal mines pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*

We note that the Ninth Circuit recently held, in *Marshall* v. *Wait*, 628 F.2d 1255 (1980), that a small, decorative rock quarry, family owned and operated since the turn of the century, could not constitutionally be subjected to warrantless inspections under the Mine Safety Act. In the special circumstances of that case, the court concluded that the owners had not impliedly consented to warrantless governmental intrusions (*id.* at 1259). The court explicitly declined to rule on the facial constitutionality of the Act's inspection provision (*id.* at 1258).

The question presented in this case is also raised in two appeals now pending before the Tenth Circuit. *Marshall* v. *Wallach Concrete Products, Inc.*, No. 80-1334; *Marshall* v. *Rose Gravel Co.*, No. 80-1027. In addition, there are at least

These courts have recognized that there are significant differences between the statutory scheme reviewed in *Barlow's* and the scheme established in the Mine Safety Act. See *Marshall* v. *Texoline Co.*, *supra*, 612 F.2d at 937; *Marshall* v. *Nolichuckey Sand Co., Inc.*, *supra*, 606 F.2d at 695-696; *Marshall* v. *Stoudt's Ferry Preparation Co.*, *supra*, 602 F.2d at 594; see also *Marshall* v. *Sink*, *supra*, 614 F.2d at 38-39.

OSHA authorizes representatives of the Secretary of Labor to search any establishment that is engaged in a business affecting interstate commerce and that has employees. 29 U.S.C. 657(a), 652(5). The representatives may enter any areas of the establishment where work is performed by an employee and may inspect all pertinent conditions, structures, equipment, and materials. 29 U.S.C. 657(a)(1), (2). As the court noted in *Marshall* v. *Nolichuckey Sand Co. Inc.*, *supra*, 606 F.2d at 696, "[a]pproval of warrantless inspections in such an 'across the board' manner would have eviscerated the holding in *See* v. *Seattle* and would have turned the exception into the rule." See *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313. In contrast to OSHA, the Mine Safety Act covers a single industry with an acknowledged history of serious accidents and unhealthful working conditions.

Moreover, the Court in *Barlow's* declined to uphold warrantless inspections in the OSHA context because

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two appeals pending concerning warrantless inspections under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq. Andrus* v. *P-Burg Coal Co., Inc.*, No. 80-1916 (7th Cir.); *United States* v. *White*, No. 79-5386 (6th Cir.). These cases involve inspections of surface coal mining operations to enforce codes designed to prevent injury to the environment and the public health and safety.

the result would have been to "devolve[] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 323. The Occupational Safety and Health Act does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search, other than to require that the inspections be performed "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner * * *." 29 U.S.C. 657 (a)(2). In addition, although the Secretary is authorized to promulgate health and safety standards under OSHA (29 U.S.C. 655), that statute also contains a "general duty" clause (29 U.S.C. 654(a)(1)), which can give rise to a citation even though no specific health or safety standard has been violated.[21] By comparison, the Mine Safety Act requires that *all* mines be inspected on a regular basis, and sets a minimum number of annual inspections. The Act places limitations on the purposes for which searches may be conducted and also limits the situations in which no notice is required. See *Marshall* v. *Texoline Co., supra*, 612 F.2d at 937.[22] Unlike OSHA, the Mine Safety Act contains no "general duty" clause authorizing

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[21] 29 U.S.C. 654(a)(1) provides:

Each employer—

> (1) shall furnish to his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

[22] The Act also grants the mine operator a right to accompany the Secretary's representative during his inspection of the mine. 30 U.S.C. (Supp. II) 813(f).

the Secretary to issue a citation even where a specific standard has not been violated.[23] In order to cite an employer under the Mine Safety Act, the Secretary must allege a violation of a particular standard. Those standards are all contained in the Act or in Title 30 of the Code of Federal Regulations. Thus, by providing in the Mine Safety Act specific limitations on the Secretary's inspection authority, Congress has "minimize[d] the risk of unreasonable assertions of executive authority." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759.

Furthermore, in the OSHA context, a search warrant performs the valuable functions of assuring the business owner that the inspection is authorized by law and advising "the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323; see *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 532. As the Court observed in *Barlow's*, "[a] warrant * * * would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." 436 U.S. at 323. Mine operators, on the other hand, are well aware of the Secretary's authority to conduct regular inspections of all mine facilities with a specified frequency, and they are also required to be familiar with the safety and health standards promulgated pursuant to the Mine Safety Act. 30 U.S.C. (Supp. II) 811(e). Accordingly, a warrant is not necessary to serve these purposes in connection with inspections of mines.

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[23] Congress specifically rejected the idea of including a "general duty" clause in the Mine Safety Act. S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 38-39 (1977).

Finally, unlike OSHA, the provisions of the Mine Safety Act expressly "envision resort to federal-court enforcement when entry is refused * * *." *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 321. Because the statutory scheme requires the government to obtain judicial authorization before an inspection is forced upon an unwilling party, the Act provides safeguards roughly equivalent to those contained in traditional search warrants. See *United States* v. *Mississippi Power & Light Co.*, No. 79-2636 (5th Cir. Mar. 6, 1981), slip op. 4296.[24]

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[24] In addition, under the Secretary's regulations (30 C.F.R. 100.4) an operator may be subject to a civil penalty for denying entry to an inspector seeking to conduct a search pursuant to the Mine Safety Act. The opinion of the district court denying the government's motion to amend the judgment (J.A. App. 11a-12a) clearly indicates that the judgment below is not based on the court's discussion, in its decision granting summary judgment for appellees (J.S. App. 5a), regarding the civil penalty provision of the Act, 30 U.S.C. (Supp. II) 820(a). There is, in any event, nothing in this provision to cast doubt on the validity of the Act. Under the Act, any penalty assessed by the Secretary is reviewable by an administrative law judge, by the Federal Mine Safety and Health Review Commission, and by a federal court of appeals. 30 U.S.C. (Supp. II) 815(d), 823(d)(1), (2)(A), and 816. This scheme affords adequate protection against a wrongly assesssed penalty. As noted earlier (see note 3, *supra*), Waukesha's challenge to the penalty assessed in this case is currently pending before the Mine Safety and Health Review Commission.

Furthermore, the district court erred in concluding (J.S. App. 5a) that imposition of a penalty for frustrating a safety and health inspection "does not present a fair means for protecting privacy interests." In *Colonnade Catering Corp.* v. *United States*, *supra*, the Court noted that Congress had selected a standard for inspections that did not permit forcible, warrantless entries, but instead made it an offense, punishable by a mandatory $500 fine, for a liquor licensee to refuse admission to the inspector. 397 U.S. at 74, 77. The civil penalty provision of the Mine Safety Act similarly protects

In light of these major differences between OSHA and the Mine Safety Act, the district court's reliance on *Barlow's* was clearly misplaced. As noted above, because *Barlow's* did not extinguish but rather reaffirmed the exception recognized in *Biswell* for inspections of pervasively regulated businesses, the court below erred in focusing solely on the length of federal regulation of the stone quarry industry.

In our view, length of regulation is neither a necessary nor a sufficient reason to justify warrantless inspections under the administrative search exception. Rather, the dispositive factors in this context are the importance of the federal interests involved, the pervasive nature of the regulatory scheme at issue, the necessity for dispensing with the warrant requirement, the reasonable privacy expectations of the regulated industry, and the extent to which the statutory scheme protects those privacy interests. Length of regulation is no doubt of some significance, but only because it may indicate that Congress has consistently perceived that a particular regulatory program is important or that an employer in a particular industry cannot reasonably harbor certain expectations of privacy from government inspection. But merely because Congress has regulated in one area, even for a long period of time, does not neces-

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the security and privacy of mine operators by precluding government inspectors from making forcible entries without a warrant. Without such a penalty, mine owners would have no incentive to permit inspections without forcing the Secretary to obtain an injunction when inspecting each mine for the first time. Moreover, assessment of a $1,000 penalty, as in the present case, does not rise to the level of a penalty so "great that non-compliance and a judicial challenge cannot be risked." See *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976).

sarily mean that regulation in other areas may be enforced by warrantless searches. Thus, in *Barlow's*, this Court rejected the argument that "the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail." 436 U.S. at 314. By the same token, the fact that pervasive regulation by the federal government is of relatively recent vintage, while entitled to some consideration in weighing the factors mentioned above, cannot be conclusive.[25]

In any event, we note that in Wisconsin stone quarries such as Waukesha's have been subject to warrantless inspection by state officials since about 1922,[26] by federal mine inspectors since 1966 and by federal explosives inspectors since 1970. In these circumstances, we doubt that it could seriously be argued that Waukesha's management, which obtained

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[25] For example, few people would question the federal government's legitimate interest in pervasively regulating the nuclear power industry or its compelling need to conduct routine safety inspections of facilities in that new industry. See 42 U.S.C. 5846(d); 10 C.F.R. 19.14.

[26] Most other states have also had substantial involvement in regulating the noncoal mining industry. A study submitted to Congress in 1965 by the Secretary of the Interior noted that 45 states and Puerto Rico had provided for safety regulation of the mineral mine industry. Of these states, 33 specifically required the inspection of all mines, the laws were not specific as to inspection in five states, and in seven states inspections were limited to mines producing only certain commodities or employing a specified minimum number of workers. In most states, the intervals between inspections ranged from one to twelve months. 1 *Health and Safety Study of Metal and Nonmetal Mines, A Report to the Congress By the Secretary of the Interior in Response to Pub. L. No. 87-300, 75 Stat. 649*, at 50-52 (1965).

control of the mine in May 1967 (J.A. 26a), has not in effect consented to the interference with privacy interests imposed by warrantless inspections under the Mine Safety Act. In contrast, the Court in *Barlow's* refused to infer voluntary consent to searches from "the single fact that one conducts a business affecting interstate commerce * * *." 436 U.S. at 314.

In sum, given the overwhelming governmental interest in protecting the lives and health of mine workers, the need for frequent, unannounced inspections of mines to accomplish the statutory purpose, the minimal threat to the privacy interests of mine operators, and the slight additional benefit to those privacy interests that a warrant requirement would provide, we submit that warrantless inspections pursuant to the Mine Safety Act are reasonable under the Fourth Amendment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 339711 266